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8 **UNITED STATES BANKRUPTCY COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 In re

12 HYPERIKON, INC.

13 Debtor

Bankruptcy Case No. 21-01776-LT-7

RS No. JJB-1

14 **OPPOSITION TO EMERGENCY**
15 **MOTION**
16

17 TRUSTEE, LEONARD J.
18 ACKERMAN'S MEMORANDUM OF
19 POINTS AND AUTHORITIES IN
20 OPPOSITION TO SREIT 4820
21 INDIANPOLIS DRIVE, LLC
22 EMERGENCY MOTION FOR RELIEF
FROM STAY

23 Date: May 27, 2021

24 Time: 2:00pm

25 Dept.: 3

Judge: Taylor

1 Leonard J. Ackerman, Trustee, hereby files the following Memorandum of
2 Points and Authorities in Opposition to SREIT 4820 Indianapolis Drive, LLC's,
3 (Movant's), emergency motion for relief from stay:
4

5 I. INTRODUCTION
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7 The Movant's motion is meritless, is not supported by evidence in many
8 critical respects, and constitutes a blatant abuse of the emergency motion
9 procedures. Accordingly, not only should the motion be denied, the Trustee should
10 be awarded sanctions under Bankruptcy Local Rule 9013-9, in an amount to be
11 proven up a later date, by motion.
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14 II. MOVANT HAS WHOLLY AND COMPLETELY FAILED TO
15 ESTABLISH ANY EMERGENCY AND, ADDITIONALLY, THE
16 PROPER VEHICLE FOR THE RELIEF SOUGHT IS AN
17 ADVERSARY PROCEEDING, NOT AN EMERGENCY MOTION

18 There is no emergency here, and the Movant not only has failed to
19 establish any emergency, it has presented as "fact", without evidence, things that
20 are simply untrue and that were known, or should have been known, to Movant,
21 very readily.
22

23 Movant devotes just 8 lines to describing the "emergency" which, in total,
24 amounts to the simple assertion that rent from the subtenant is due June 1, 2021.
25 (Doc. 19-1, p. 11 ¶ 25 (sic)(the para. follows para. 33). That is it. That is the
26 emergency. The petition was filed April 30, 2021. Movant has offered no evidence
27 that that the Trustee has received any rent from the subtenant for the May 1st
28

1 subrent. In fact, The Trustee did not receive the May rent from the subtenant, as it
2 was apparently paid to the Debtor, early and pre-petition. (See, Ackerman Dec.,
3 filed concurrently herewith, ¶ 3(h)]. The Trustee has not yet been able to trace
4 funds to see if the rent was among the funds turned over to him by the Debtor's
5 bank. [Ackerman Dec. ¶ 3(g)], but he certainly did not receive any post-petition
6 rent from the subtenant.
7

8 The Debtor listed no secured creditors on its schedules, but Trustee's counsel
9 has located several UCC Financing Statements, including one in favor of the US
10 Small Business Administration[Ackerman Dec. ¶ 3(g)] . The Debtor listed the US
11 Small Business Administration on its schedules as a disputed general unsecured
12 creditor in an amount in excess of \$400,000. The Trustee is in the process of
13 determining if the financing statement is valid and, if valid, if it reaches any of the
14 funds that the Trustee presently holds.
15

16 Counsel for the subtenant has informed counsel for the Trustee that he has
17 instructed his client to reserve the sublease rent due June 1, 2021 and all
18 subsequent rents, until the issues over the lease and sublease are resolved.
19 [Ackerman Dec. ¶ 3(j)].
20

21 Trustee also is informed and believes that counsel for the Movant has been
22 in contact with counsel for the subtenant. There is simply no emergency here. Even
23 if the Trustee were receiving rent from the subtenant, there would still simply be
24 no emergency. There is no allegation that the Trustee would dissipate those rentals.
25 Even if, in fact, sublease rent were being paid to the Trustee, Movant has cited no
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27
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1 authority or case law showing that such circumstances would give rise to an
2 “emergency” motion for relief from stay.

3
4 Additionally, and most importantly, Movant is only seeking relief from stay
5 as an adjunct to declaratory relief and seeking relief from stay and adequate
6 protection in the alternative. Movant’s stated primary goal is to have the Court
7 “confirming that the Debtor’s right to receive rent from the Subtenant terminated
8 pre-bankruptcy.” (Doc. 19-1 ¶ 23). This is the stuff of adversary proceedings.
9
10 Essentially, Movant is seeking declaratory relief with respect to the parties’ rights
11 under the lease and Consent to the Sublease with respect to the leased real
12 property.

13
14 It is clear why the Movant is doing so. The stated monthly base rent under
15 the master lease is apparently \$46,360 (Doc. 19-2, p.41), while the minium montly
16 base rent due under the sublease appears to be \$64,600 (\$775,200/12) (Doc. 19-2,
17 p.84). The Movant wishes to claim that substantial positive rent differential for
18 itself, all to the detriment of the bankruptcy estate and creditors.

19
20 But such declaratory relief can only be sought by way of an adversary
21 proceeding. See, e.g. In Re DBSI, Inc, 432 B.R. 126 (Bkrptcy, D. Del. 2010), cited
22 with approval by the Ninth Circuit Bankruptcy Appellate Panel in In Re
23 Aftandilian, 2014 WL 1244789, *5 (noting that “bankruptcy court correctly ruled
24 that [movant’s] failure to bring his declaratory relief action as an adversary
25 proceeding was a sufficient ground, by itself, to justify denial of the motion”, and
26 also citing Bear v. Coben, 820 F.2d 705, 711-12, (9th Cir. 1986) for the same
27 proposition.
28

1 Clearly, the relief sought with respect to who has the right to collect rents from
2 the subtenant must be sought via Adversary Proceeding. Additionally, the
3 subtenant may be a necessary party to any such adversary proceeding. Movant does
4 not indicate that it even gave the subtenant notice of this emergency motion.
5

6 Movant's tactics in filing this motion on an emergency basis are particularly
7 disturbing because the initial Section 341(a) meeting has not yet been had and, as
8 such, the Trustee has no way of determining whether any of the factual assertions
9 made by the Movant as to the Debtor's purported failure to pay rent and breaches
10 under the lease are accurate, or what the actual state of affairs, pre-petition, was
11 between the parties as to notices, waivers, and discussions. The Trustee reserves all
12 rights to test the veracity of the factual allegations in both of Movant's emergency
13 motions.
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15

16 Moreover, as noted below, there is also a real, material dispute here as to
17 whether or not the so-called termination notice was provided pre or post petition-
18 an issue that requires a full factual examination and legal analysis. This is not just a
19 question of the proper vehicle.
20

21 Trustee's counsel has been in contact with counsel for the subtenant and
22 anticipates that such counsel may attend the hearings in this matter on May 27th.
23

24 III. THE MOTION, SUBSTANTIVELY, IS WITHOUT MERIT 25

26 The motion is without merit for a number of reasons.

27 First, the Movant requests that the Court determine that the Trustee's right to
28 receive rent from the subtenant terminated prebankruptcy. (Doc. 19-1, ¶ 25). As

1 noted above, the Trustee respectfully submits that the dispute over whether or not
2 such rights were terminated, must be addressed via adversary proceeding.

3
4 Moreover, as noted elsewhere, in the companion emergency motion filed by
5 the Movant seeking relief under section 365, the Movant claims the lease has not
6 expired. In the instant motion, Movant claims that the lease was terminated, pre-
7 petition. Both statements cannot be true.

8
9 The Movant claims that it delivered a Notice of Default to the Debtor prior to
10 the petition date. (Doc. 19-2, ¶ 11, Ex. 5), and that the Debtor failed to timely cure
11 the default. (Doc. 19-1, p. 7, ¶¶ 26-28). However, the Notice of Default is dated
12 April 26, 2021 and indicates that it was sent by overnight courier. (Doc. 19-2, p.
13 112). No proof of actual delivery has been proffered, no authority has been cited
14 showing that service of the Notice of Default was proper under Indiana law. The
15 Notice did not set out a cure period. The master lease does not seem to set one out
16 either. The Movant does not establish or aver that the Notice was proper and in
17 accordance with Indiana law and does not state what the cure period was or when
18 it started to run. Only legal conclusions are offered in this regard by the Movant.

19
20 Additionally, just four days after the date of the Notice of Default, the
21 Movant purportedly sent a Notice of Lease Termination. (Doc. 19-2, p. 124).
22 Notably, Movant asserts that the Notice of Termination was sent prior to the filing
23 of the bankruptcy petition. (Doc. 192, ¶ 14). This has not been established. The
24 Notice of Termination is dated April 30, 2021 and says that it was “Sent Via
25 Overnight Delivery”. The bankruptcy petition was filed on April 30, 2021. Movant
26
27 has not established that overnight delivery of such a notice is permissible under
28

1 Indiana law, or in compliance with the lease terms, (which do not appear to
2 authorize email service), or that service of such notice is effective at the time it is
3 mailed, or that a notice mailed the same day a bankruptcy petition is filed is
4 otherwise effective and not a violation of the stay.¹ The Trustee's investigation is
5 continuing in this regard. The Trustee also intends to investigate, if needed,
6 whether there was any waiver of the notice by Movant. Given the "emergency"
7 nature of these proceedings, the Trustee has not been afforded time to investigate
8 either the facts or the applicable Indiana law.
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10

11
12 IV. AS TO THE ALTERNATIVE ADEQUATE PROTECTION RELIEF
13 SOUGHT, THE MOTION IS WITHOUT MERIT

14 The alternative relief sought by the Movant- adequate protection, is not
15 warranted. The alternative relief sought is sometimes phrased by Movant as "a
16 right to collect rent from the Subtenant" (Doc. 19-1, ¶ 25), which, as noted above,
17 requires an adversary proceeding. The alternative relief is also sometimes
18 described by Movant as "adequate protection" (Doc. 19-1, ¶ 31). As noted above,
19 these are two entirely different things- and adequate protection is already provided
20 by the Subtenant's willingness to reserve all future rent payments.
21
22

23 The Trustee does not believe the lease was terminated. Some of the factual
24 inaccuracies and evidentiary concerns in Movant's instant motion are highlighted
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28 ¹ Movant purportedly also sent a notice of termination via email, although this is not mentioned in the moving papers. Trustee believes that if a notice of termination was sent by email, it was not effective, for a variety of reasons. The Trustee's investigation is continuing in this regard.

1 in these papers. Some of the factual inaccuracies in the 365 motion are highlighted
2 in the Trustee's response to that motion, filed concurrently herewith.

3
4 As noted in the opposition to the motion under Section 365, Movant is more
5 than adequately protected between the security deposit and the Subtenant's
6 willingness to reserve future rents.

7 In the interests of judicial economy, the Trustee's opposition to each motion
8 are incorporated in the other opposition by reference.

9
10 V. TRUSTEE IS ENTITLED TO SANCTIONS AGAINST MOVANT
11 UNDER LOCAL BANKRUPTCY RULE 9013-9

12 The Trustee is entitled to sanctions from Movant under Bankruptcy Local
13 9013-9. Bankruptcy Local Rule 9013-9(i) is entitled "Emergency Motions" and
14 subsection (i) provides, in full, as follows:

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17 "(i) Sanctions: If sanctions are appropriate based on improper use of
18 the emergency motion procedure, sanctions may be awarded
19 regardless of the ultimate determination of the merits if later heard as
20 a fully noticed matter."

21 For all the reasons cited set out above, sanctions should be awarded to the
22 Trustee, to be determined by motion or declaration at a later date. Trustee suspects
23 that this abuse of the emergency motion procedure may be calculated to put
24 pressure on the bankruptcy estate to sell its rights under the sublease to the
25 Movant, at a below market price. Not only did the Movant seek to incorrectly re is
26 clearly no pressing emergency.obtain declaratory relief under the guise of a relief
27
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1 from stay motion, but it sought to do so on an emergency basis, when there is
2 clearly no pressing emergency.
3

4 VI. CONCLUSION

5 For all the foregoing reasons, the Trustee respectfully requests that:

- 6 a. The motion be denied,
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8 b. That the Trustee be provided with the additional 60 days available
9 under Section 365(d)(3) of the Bankruptcy Code, through and
10 including June 29, 2021 to comply with his obligations under Section
11 365(d), and
12
13 c. That the Trustee be awarded sanctions against Movant and its
14 counsel, in an amount to be proven by subsequent declaration, under
15 Bankruptcy Rule 9013-9, for their abuse of the emergency motion
16 procedure.
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20 Date: May 27, 2021

21 KIRBY & McGUINN, A P.C.

22 By: /s/ Roberta S. Robinson
23 Roberta S. Robinson
24 Proposed Attorneys for Leonard J.
25 Ackerman, Trustee
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